United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1294

To be Argued by
PAULA VAN METER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1294

UNITED STATES OF AMERICA, ex rel.
CARL M. ROBINSON,

Petitioner-Appellant,

-against-

LEON J. VINCENT, SUPERINTENDENT,
GREEN HAVEN CORRECTIONAL FACILITY
STORMVILLE, NEW YORK,

Respondent-Appellee.

REPLY MEMORANDUM OF PETITIONER-APPELLANT

PAULA VAN METER
Attorney for Petitioner-Appellant
One Wall Street
New York, New York 10005
(212) 785-1000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel, CARL M. ROBINSON,

Petitioner-Appellant,

-against-

LEON J. VINCENT, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY STORMVILLE, NEW YORK,

Respondent-Appellee.

No. 74-1294

REPLY MEMORANDUM OF PETITIONER-APPELLANT

This case is before the Court on appeal from the Order of the United States District Court for the Southern District of New York, 371 F.Supp. 409 (1974), denying petitioner's application for writ of habeas corpus founded on the illegality of the in-court identification which constituted the sole basis for his state court conviction. The brief for petitioner was filed on September 3, 1974. Respondent's brief, filed on October 3, 1974, distorts petitioner's arguments, makes erroneous conclusions as to the application of fact and law, and generally avoids facing the issues which this Court must decide. This memorandum seeks to remove the obfuscation and inaccuracy of respondent's brief. Respondent has ignored the crucial factual issue that the prejudicial effect of the unlawful pretrial identifications is proven by undisputed

evidence; in addition, the authorities relied upon by respondent are either clearly distinguishable or are inconsistent with subsequent judicial treatment.

I. This Court May Review the Findings of the District Court and Determine that the In-Court Identification Lacked Independent Source and Resulted Directly from the Unconstitutional Police Identification Procedures

Faced with a pretrial identification and habeas corpus issue, the United States Supreme Court recently rejected the argument made by respondent herein and found that it could independently review the record below. In Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972) the Court held that review of factual issues is appropriate where such facts are contained primarily in the state court record which is available to the reviewing court, and "where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." Here too, this Court should review the undisputed record and make an independent judgment of the constitutional significance of the facts. Cf. U.S. ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973).

The critical fact misconstrued by both the District Court, 371 F.Supp. at 422, 423, and by respondent (Respondent's Brief p. 16) is that the discrepancies in the descriptions given of the assailant by Voltaggio, the sole identifying witness, demonstrate conclusively that the illegal pretrial procedures

had tainted Voltaggio's ability to make an in-court identification. Such taint is clear from the fact that the specificity of each description increases over a period of years with each added detail following directly from an unlawful source. Voltaggio supplied four descriptions of the assailant: 1) the police alarm prepared approximately two hours after the crime; 2) the description at the Warrant Hearing later that same day; 3) in testimony at the state trial 21 months after the crime; and 4) in testimony at the District Court evidentiary hearing held five years after the crime. The sequence of prejudicial influence and its effect is as follows:

> May 3, 1968 - police alarm describing assailant, "25 years old, 5'7", 150 lbs., brown complexion, dark shirt and jacket, dark pants.
>
> May 3, 1968 - testimony of Odessa Chambers at Warrant Hearing describing Carl Robinson as brown-skinned, 5'7" or 5'8" wearing a black jacket, white shirt and light colored pants.
>
> May 3, 1968 - Voltaggio's description of assailant at Warrant Hearing, given immediately after hearing the Chambers' testimony, "brown-skinned, 5'7" or 5'8", (wearing) a dark jacket and ... light pants." [no mention of age or weight; different description of clothing -- both in duplication of Chambers' testimony].
>
> May 4, 1968 - Carl Robinson was displayed to Voltaggio at a one-man showup at the precinct station, found to be unlawful by this Court [468 F.2d at 163], presumably appearing as he does in the police photograph dated May 5, 1968 wearing an Afro haircut with a part and a thin mustache.
>
> May 5, 1968 - The police photo, described above, was singly displayed to Voltaggio.

February 10, 1970 - Voltaggio's description of assailant at state trial "approximately 5'7", about 25 years old --23 to 25-- had on dark suit jacket, dark pants, light-skinned, about 150 pounds, Afro haircut with a part in it, and a mustache." (detail of Afro haircut and mustache added for first time after 21 months, in spite of inability to correctly recall other details of the crime [468 F.2d at 164]).

May 29, 1973 - Voltaggio's description of assailant at District Court hearing, "light-skinned, 23-25 years old, 135 - 150 lbs., 5'8" - 5'9", wearing a dark suit jacket, dark pants, a short Afro haircut and a pencil-stripe moustache." (testimony given after reviewing trial testimony and examining police photo of Carl Robinson; detail of short hair added).

As time passed and Voltaggio's memory dimmed as to other details of the crime (as noted by the District Court, 371 F.Supp. at 413, 414, 417, 418) his descriptions of the assailant became more detailed. Each added detail is supplied by a pretrial unlawful confrontation focusing on Carl Robinson. A simple review of these descriptions reveals how significantly Voltaggio's court testimony differs from the more reliable first impression record of the police alarm. It is therefore incontrovertibly clear that Voltaggio's ability to make an in-court identification at the trial of Carl Robinson had been irremediably tainted.

II. The District Court Decision Is Based Upon an Incorrect Legal Standard and an Insufficient Standard of Proof

Respondent's cursory reading of Judge Cooper's Opinion fails to recognize its fundamental legal weakness which error

requires reversal by this Court. While Judge Cooper does correctly state the legal standard of United States v. Wade, 388 U.S. 218 (1967), he fails to apply the Wade standard to this case. As discussed more fully in Petitioner's Brief at pp. 39-44, the District Court made a finding of basis for the in-court identification based upon facts concerning the viewing of the assailant at the crime and details of the pretrial showup presented by Voltaggio and satisfactory to the Court by a "fair preponderance of the credible evidence," 371 F.Supp. at 415. Entirely separate from this finding the District Court determined that the unlawful pretrial procedures, though unnecessarily suggestive, did not create a "substantial likelihood of irreparable misidentification", thereby incorrectly utilizing the standard of Stovall v. Denno, 388 U.S. 293 (1967). The District Court failed to make the necessary determination, utilizing the correct legal and evidentiary standards, of whether the state had shown by clear and convincing evidence that Voltaggio's in-court identification was untainted by the illegal procedures which preceded it.

III. Respondent's Argument is Entirely Without Applicable Legal Support

All of the cases which respondent cites as principal authority in opposition to petitioner's argument for habeas corpus relief are clearly distinguishable from the facts of this case and the legal standard involved. The following

list of those cases categorizes them in accordance with the distinguishing points, which categories are as follows:

1) Cases involving pre-Wade identifications or photograph displays and therefore utilizing the legal standard of Stovall.

2) Cases in which the identification is neither the sole nor determinative evidence upon which the conviction was based.

3) Cases involving more extended viewing at the crime or corroboration of the "independence" of the in-court identification.

Some cases are listed in more than one category.

1) Cases involving pre-Wade identifications or photograph displays and therefore utilizing the legal standard of Stovall:

United States v. Yanishefsky, ___ F.2d ___ (July 30, 1974), sl. sh. op. no. 1145.

United States ex rel. Armstrong v. Casscles, 489 F.2d 20 (2d Cir. 1973).

United States ex rel. Frasier v. Henderson, 464 F.2d 260 (2d Cir. 1972).

United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973).

United States ex rel. Lucas v. Regan, ___ F.2d ___ (2d Cir., Sept. 3, 1974), sl. sh. op. #1070.

United States ex rel. Miller v. LaVallee, 436 F.2d 875 (2d Cir. 1970).

United States ex rel. Phipps v. Folette, 428 F.2d 912 (2d Cir. 1970).

United States ex rel. Springle v. Follette, 435 F.2d 1380 (2d Cir. 1970).

2) Cases in which the identification is neither the sole nor determinative evidence upon which the conviction was based:

United States ex rel. Cummings v. Zelker, 455 F.2d 714 (2d Cir. 1972) (confession in evidence).

United States ex rel. Frasier v. Henderson, supra (admission and fruits of crime found in defendant's possession).

United States ex rel. Gonzalez v. Zelker, supra (confession not in evidence).

United States ex rel. Lucas v. Regan, supra (testimony of co-defendant).

United States ex rel. Springle v. Follette, supra (defendant caught at scene in possession of stolen goods).

3) Cases involving more extended viewing at the crime or corroboration of "independence" of the in-court identification:

United States v. Kahan, 479 F.2d 290 (2d Cir. 1973) (two observations of 20 minutes each; corroboration).

United States v. Yanishefsky, supra (viewing within several feet; corroboration).

United States ex rel. Armstrong v. Casscles, supra (independent evidence of ability to recognize).

United States ex rel. Cummings v. Zelker, supra (witness stared at face for 15 seconds and made identification within one hour after crime).

CONCLUSION

For the reasons stated herein and for the reasons stated in the Brief for Petitioner-Appellant this Court should

reverse the decision of the District Court and order the writ of habeas corpus to issue.

RESPECTFULLY SUBMITTED,

Paula Van Meter

PAULA VAN METER
Attorney for Petitioner-Appellant
One Wall Street
New York, New York 10005
(212) 785-1000

74-1295

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

GABRIEL GALINDO-VALDEZ,

Appellant.

Docket No. 74- 1295

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 73202971

SHEILA GINSBERG,
Of Counsel

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- GABRIEL GALINDO-VALDEZ, Appellant.	Docket No. 74- 1295

BRIEF FOR APPELLANT PURSUANT TO ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether there are any non-frivolous issues to present on appeal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) entered on March 1, 1974, convicting appellant, after a trial before a jury, of having illegally entered the United States, in violation of Title 8, United States Code, §1326, and sentencing him to a term of imprisonment for two years and fining him $1,000, execution of the sentence to be suspended and appellant to be placed on unsupervised probation for a period of five years pursuant to 18 U.S.C. §5010(a), with the special condition that appellant be deported and not return to the United States or its territories during the probationary period, nor without the consent of the Attorney General after the probationary period.

By an order dated March 5, 1974, this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged in a one-count indictment with illegal entry into the United States, in violation of 8 U.S.C. §1326. At trial, the Government presented the testimony of Milton Brech, a criminal investigator with the Department of

Justice, Immigration and Naturalization Service (14-47*); Horace Jacobs, an employee of the New York City Housing Authority Police Department (formerly a deputy marshal with the United States Department of Justice) (48-54); and George Wynn, a fingerprint examiner with the Federal Bureau of Investigation (54-79).

The evidence established that on September 13, 1973, appellant was interviewed by Milton Brech who, upon inquiry, found in appellant's pocket a Mexican military identification card in the name of Gabriel Galindo-Valdez and a Social Security card in the name of Jose Diaz (20). The military identification card set forth that Gabriel Galindo-Valdez was born in Mexico City on February 24, 1953. The identification card also bore a photograph** of Galindo-Valdez (23) and two fingerprints (24). Through Brech's testimony it was established that on April 2, 1973, appellant had been deported to Mexico pursuant to an order of the Immigration and Naturalization Service (28). According to Brech, the order was signed after a hearing on government allegations that appellant was a native and citizen of Mexico, that he had previously been deported from the United States to Mexico in 1971, and that he had not obtained permission from the Attorney General to return (27). Attached to the order, and introduced into evidence, was a copy of the form

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*Numerals in parentheses refer to pages of the trial transcript.

**Brech testified that the photograph was wet and difficult to distinguish.

issued to all persons deported from the United States which informs such persons in the Spanish, Greek, Portugese, Chinese, and English languages, that before re-entry into the United States they must apply to the Attorney General for permission to return to the United States (31).* According to Brech, based on a certification of non-existence of a record (30), the Immigration and Naturalization Service has no record of Gabriel Galindo-Valdez' applying for permission to come back into the United States (31).

George Wynn testified that upon examination of the fingerprints found on the military identification card and the fingerprints taken from appellant on September 19, 1973 (50), he determined that the fingerprints were made by the same person (62).

At the close of the Government's case the defense moved for a judgment of acquittal because the Government had failed to establish guilt beyond a reasonable doubt (81). The motion was denied (81).

Appellant testified in his own behalf. He asserted that his name was Luis Spittle -- not Gabriel Galindo-Valdez -- and that he was born in San Antonio, Texas (84, 88). He explained that Gabriel Galindo-Valdez was a friend of his who had been killed (88). Appellant had Valdez' military identification card in his possession when confronted by the Immigration and Naturalization Service Agents because he had in-

---

*Appellant is Spanish-speaking.

tended to mail it to Valdez' mother (88). Appellant conceded that he had three times previously been deported from the United States (86).

On cross-examination appellant asserted that he had had the Valdez documents since some time in 1972 (97). He stated that he got the documents after Valdez was killed in a fight in a bar in San Francisco* (101). Appellant admitted that the first two times he was deported, he was deported under the name Gabriel Galindo-Valdez, despite the fact that Valdez was alive and living in Los Angeles at the time and appellant did not have the Valdez documents in his possession (106-09).

Finally, the Government introduced a statement** taken from appellant after a recitation of Miranda warnings (115). The statement was taken on March 13,1973, before appellant was deported for the third time (114). Appellant conceded he had signed the statement (111). In it appellant admitted that his name was Gabriel Galindo-Valdez (114), that he was born in Mexico City on February 24, 1953, and that he was a citizen of Mexico (115).

---

*In response to questions by the Court, appellant asserted that he did not know the name of the bar nor its address (102). He was certain, however, that the bar was located in San Francisco, and that Valdez died as a result of a blow to his head (103). Defense counsel objected to the Court's participation in the examination of appellant (103).

**Defense counsel did not object to the use of the statement for the purpose of cross-examination (112).

On re-direct examination appellant explained that he had signed the statement under duress because he believed it was the only way he could get out of jail (117-18).

In his charge to the jury, Judge Mishler instructed that the March 13, 1973, statement was introduced by the Government as a prior inconsistent statement, that it was impeaching evidence, and that the effect it had on appellant's credibility was solely a question for the jury to determine (166):

> ... You determine whether the statement is inconsistent, whether it is as to a material matter and whether now and how and to what extent it affects his credibility, his believability.
>
> (166).

The Court did not caution the jurors that they could not use the statement as evidence that appellant was Gabriel Galindo-Valdez, a Mexican citizen.

With regard to the Court's participation in the cross-examination of appellant, Judge Mishler instructed:

> I meant to say parenthetically that during the trial I asked some questions. Now don't place any special significance on the questions and on the answers to the questions that I asked. Don't attach any greater emphasis on the questions or the answers because I asked them. If I asked a question it is because I was confused as to a certain area of the testimony and felt it would be helpful for you if I asked some questions to clear it up and that was the only purpose. I asked it almost as a lawyer would ask in examining a witness and not

> as a judge. Again, the sole purpose was to clear up what I thought at the moment might have been a confusion. It might not have been an issue that confused you, but at times I guess at those things and think it might be helpful.
>
> (164-65).

After deliberation, the jury convicted appellant as charged (177).

STATEMENT OF POSSIBLE LEGAL ISSUES

The only possible appellate issues presented by the record in this case are (1) whether the judge's failure to instruct the jurors specifically that they were not to consider appellant's March 13, 1973, statement to the Immigration Service authorities as evidence of guilt is plain error; and (2) whether the judge's participation in the cross-examination of appellant was so prejudicial as to mandate reversal.

I

On cross-examination of appellant the Government introduced into evidence a statement taken from appellant on March 13, 1974, by Immigration Service authorities. Defense counsel did not object to the statement's use on cross-examination, assuming that, pursuant to Harris v. New York, 401 U.S. 222 (1971), it would be used only for impeachment.

In his instruction to the jurors, the trial judge directed them to consider appellant's statement as "impeach-

ing evidence" which was relevant on the issue of appellant's credibility. However, the judge failed to instruct the jury, as required by Harris v. New York, supra, that the statement was not to be used by the jurors as evidence of guilt.

No request for such an instruction had been made, and no exception was registered to the charge as given. Moreover, the statement itself establishes that Miranda warnings were given to appellant before the statement was elicited, so this Court will not consider whether failure to instruct in accord with Harris v. New York, supra, was plain error. United States v. Gaynor, 472 F.2d 899 (2d Cir. 1973).

II

During the trial defense counsel objected to the trial judge's participation in the cross-examination of appellant. A view of the record establishes that the judge's participation was minimal and directed at clarifying some of the testimony given. This Court has repeatedly held that it is proper for the judge to clarify testimony and to assist the jury in understanding the evidence. United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971).

Moreover, on request, the District Judge carefully instructed the jury that the court's questions were only for the purpose of clarifying testimony. The jurors, the court

cautioned, were not to place any special significance on the questions asked by the judge. United States v. Cruz, 455 F.2d 184, 185 (2d Cir. 1972); United States v. D'Anna, supra.

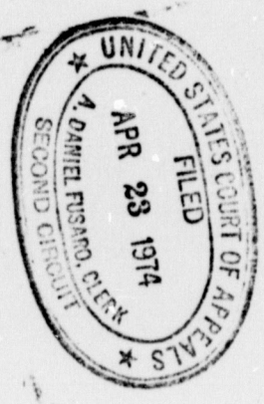
CONCLUSION

For the foregoing reasons, there are no non-frivolous issues to be presented on appeal, and the motion for an order permitting assigned counsel to withdraw should be granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel



Certificate of Service

April 23, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

Sheila Gorstein

74-1295

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

GABRIEL GALINDO-VALDEZ,

Appellant.

Docket No. 74- 1295

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 73202971

SHEILA GINSBERG,
Of Counsel

PAGINATION AS IN ORIGINAL COPY

D. C. Form No. 100

CRIMINAL DOCKET

73 CR 858 TRAVIA, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: Cunningham
vs.	
GABRIEL GALINDO-VALDEZ	
	For Defendant:

Did re-enter the US illegally, etc.

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBUR
Fine,			3/1/74	[illegible]			
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
9-20-73	Before Weinstein J - Indictment filed.
10/1/73	Before TRAVIA,J.- Case called- Deft and counsel Simon Chrein of LAS present- Deft waives reading of the Indictment and enters a plea of guilty- 30 days for motions
10-4-73	Magistrate's file 73 M 1407 inserted into CR file.
10/26/73	Notice of readiness for trial filed
1/4/74	Before TRAVIA,J. Case called Adjd to 1/11/74 to set trial date
1-11-74	Before TRAVIA J - Case called - deft & counsel Simon Chrein of Legal Aid present - adjd to Jan. 15, 1974 for trial.
1-15-74	Before WEINSTEIN J - Case called - deft & counsel S.Chrein of Legal Aid present - Joaquim Guma sworn as interpreter - Indictment amended to Title 8and not Title 18 - Hearing ordered to determine predict of charge and begun and concluded - Fingerprint report to

73 CR 858

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	be submitted by 1-18-74. Deft withdraws his plea of not guilty and having been advised of his rights by the court and on his own behalf enters a plea of guilty as charged - sentence adjd to 1-25-74 at 10:45 am.		
1-15-74	Before TRAVIA J - case called -respectfully referred to Judge Weinstein		
1-25-74	Before WEINSTEIN J - case called - deft & counsel S.Chrein of Legal Aid present - Emil Rodriguez sworn as interpreter - defts motion to withdraw his plea of guilty is granted - case to be returned for all purposes to Judge Travia.		
2-8-74	Before TRAVIA,J.- Case called- Deft and counsel Simon Chrein of L.A.S. present- Interpreter Eula Greenberg sworn- Defense counsels application to be relieved is denied as the deft informs the court that he is satisfied with present counsel		
2-20-74	Before MISHLER, CH.J.- Case called- Deft and counsel present- Interpreter Daisy Santos present- Trial ordered and begun- Jurors selected and sworn- Trial contd to 2-20-74		
2-20-74	Before MISHLER, CH.J.- Case called- Deft present with counsel- Trial resumed Joaquin Guma sworn in as interpreter- Govt rests- Deft moves for verdict of acquittal- Motion denied- Letter to Judge TRAVIA from the deft marked court's exhibit 1 and ordered sealed- Deft rests- Deft renews his motion for a judgment of acquittal- Motion denied- Trial contd to 2-21-74		
2-21-74	Before MISHLER, CH J - case called - deft & counsel S.Chrein of Legal Aid present - Interpreter Joaquim Guma present - Trial resumed - court charges Jury - at 10:35 the Jury retired for deliberations - at 2:05 PM the Jury returned with a verdict of guilty as charged - Jury polled - Jury discharged - Trial concluded - sentence set down for March 1, 1974. Defts motion to set aside the verdict is denied.		
2-21-74	Stenographers transcript dated Feb. 20, 1974 filed.		
2-21-74	By Mishler, Ch J - Order of Sustenance filed -Lunch , 15 persons.		
2-22-74	Voucher for Expert Services filed .		
3-1-74	Before MISHLER, CH J - case called - deft & counsel S.Chrein of Legal Aid present - Interpreter Emmy Trumpy present - deft sentenced to a term of imprisonment for 2 years and a fine of $1,000-execution of sentence is suspended and the deft is placed on unsupervised probation for a period of 5 years under 18:5010(a).Special condition of probation is that the deft be deported and not to return to the U.S. or its territories during his probationary period - after defts probation period he will need consent by the Atty General to enter the U.S.or its territories. Clerk to file Notice of Appeal without fee.		

GSA DC 72-14455

73 CR--858

CRIMINAL DOCKET

DATE	PROCEEDINGS
3-1-74	Judgment and Order of Probation filed - certified copies to Probation.
3-1-74	Notice of Appeal filed (no fee)
3-1-74	Docket entries and duplicate of Notice of Appeal mailed to the C of A
3-1-74	Stenographers transcript dated 2-21-74 filed.
3-7-74	Order received from Court of Appeals and filed that record be docketed on or before 3-21-74
3/21/74	Stenographer's transcript of 3/1/74 filed.
3/21/74	Record on Appeal certified and handed to Sandy Sadowitz for hand delivery to the Court of Appeals.

EJB:MCC:po
F. 733739

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73CR 858

- X

UNITED STATES OF AMERICA

-against-

GABRIEL GALINDO-VALDEZ,

Defendant.

- X

INDICTMENT

Title 18 U.S.C. §1326

THE GRAND JURY CHARGES:

On or about the 13th day of September 1973 within the Eastern District of New York, the defendant GABRIEL GALINDO-VALDEZ, having previously been arrested and deported from the United States pursuant to law on April 2, 1973, was found in the United States, the defendant well knowing that his presence in the United States was unlawful. (Title ~~18~~ 8 (amended 1/15/74) United States Code, §1326).

A TRUE BILL

Foreman.

Robert A. Ware MCC

UNITED STATES ATTORNEY

THE COURT'S CHARGE TO THE JURY

THE COURT: Good morning, ladies and gentlemen. We have reached that point in the trial where it becomes my duty to instruct you on the applicable law. We first start with a definition and description of the various areas of participation by the participants in a trial.

This is called an adversary proceeding. The lawyers are adversaries. They contest the issues in the case. They take opposite sides. They present evidence to support their view of the issues.

In this case the important essential element of the crime is: Is the defendant an alien? The defendant has submitted evidence that the defendant is a citizen born here in Texas and the Government has submitted evidence showing that he is a citizen of Mexico. That is the contest.

Now, each lawyer is emotionally tied to his client's interests and that's the way it should be. Each lawyer is a partisan. That's why a lawyer does his best and the theory is that when lawyers of comparable ability do their best, the contest over the issues develops the evidence. It brings it out before the jury for the jury to see. The point is that you are to see it. That is your job. But obviously there is a significant difference in the

relationship between the lawyers and the case and the jury and the Court and the case. The Court and the jury are objective-dispassionate while as I say, the lawyers are interested partisans.

Now, as between the Court and the jury there of course is a distinct difference in the purpose and obligation and duty. Your role in the trial is probably more important than mine. Mine is just direction. I instruct you on the law. I have made rulings during the trial. I have ruled as a matter of law as to what may go into the record. My rulings had nothing to do with the weight that you should give it. That is solely within your discretion. So when I instructed the witness on occasion to answer only the question, I was in effect saying, "That there are rules and regulations and we must abide by the rules."

Not everything that every witness wanted to say about the case may be put before the jury, so that is my function. I tried to be even-handed and I tried to be dispassionate and disinterested so that what goes before you is only what you may hear and consider.

Now, once you receive the evidence, you decide what weight should be given and then you decide what actually happened. To put it more precisely, in the

framework of this case, you decide whether the defendant is an alien. There are other essential elements of the crime, but I think the lawyers have come to you and argued that that is the critical question here.

Now, I have no view on the issues. It is none of my business to put it in the colloquial and I make it none of my business. That is solely your function as the judges of the facts.

On the other hand, the Court is the sole judge of the law and you must accept the law as I charge it. You may disagree with it, but you must set aside your personal notions as to what the law is or what the law should be and decide the case in accordance with the law as I charge it, and then having found the facts, apply the law and come to the ultimate determination as to the guilt or innocence of this defendant on this charge.

Now, a fair trial, as I said at the outset, must start with a fair jury and a fair jury really depends on your willingness to be fair and in turn your willingness to accept the law as it is charged. It is all part of it.

We now come to the presumption of innocence.

It is a time-honored presumption in Anglo-American law. It says in effect that you must conclude at the outset of the trial that this defendant is innocent of the charge in the indictment and that presumption remains with this defendant throughout the trial and throughout your deliberations and is overcome -- it falls only if and when the Government proves the guilt of the defendant beyond a reasonable doubt.

In other words, if the Government fails in its burden, then you must acquit the defendant even though you may suspect that he is guilty. The point is that the Government has the burden of proof and failure to sustain the burden demands acquittal.

You have heard of the term "Scotch verdict."

In Scotland there are three verdicts, guilty, not guilty and not proved. In this country we have only two verdicts, guilty and not guilty. In this country the not guilty includes not proved, so if the Government does not prove its case beyond a reasonable doubt you must find the defendant not guilty.

Now, what is a reasonable doubt? A reasonable doubt is a doubt which a reasonable person would have after weighing all the evidence. It is a doubt based on reason and common sense and on the state of the

record. It is not a vague, emotional doubt. It's a doubt that a reasonable person would have in a matter that he considers important to himself.

Now proof beyond a reasonable doubt is therefore proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your affairs. The Government is not required to prove the guilt of the defendant beyond all doubt. There is a qualifying adjective, and it is beyond a reasonable doubt.

Nor does the Government have to convince you beyond a reasonable doubt that all the proof that is submitted in this case is true beyond a reasonable doubt. It must prove to you that the three essential elements of the crime charged are true beyond a reasonable doubt, and I will tell you what the essential elements of the crime charged are.

The defendant does not have to offer any proof. The defendant can sit back and rely on the failure of the Government to prove its case. The failure may arise from the record or from the lack of proof. You must remember that the burden is on the Government from start to finish to prove the guilt of the defendant beyond a reasonable doubt.

What is evidence?

Evidence is the method that the law uses to prove or disprove a fact. There are two types of evidence. One is direct evidence and the other is indirect or circumstantial evidence. Direct evidence is the testimony of witnesses as to what the witness saw or heard concerning the specific matter in dispute. Circumstantial evidence is a method of proving or disproving a fact by drawing reasonable inferences based upon common sense and experience from established facts.

For example, if you were sitting here as a juror in a personal injury action and the issue there was whether the defendant who is being sued, Mr. Jones, passed a stop sign without stopping. Mrs. Smith who was injured, let us assume, charges that Mr. Smith drove his car at a certain speed and failed to stop at the stop sign and knocked her down.

Now, if my courtroom deputy -- who is not present in court at the present time because he is getting your lunch -- were at the particular intersection that had the stop sign, and assume for these purposes that he and I were talking at the corner. He, facing the intersection and facing the stop sign

and I having my back to the stop sign. If he were called to testify he might say, "Well, I was talking to the judge and through the corner of my eye I saw Mr. Jones driving his 1974 convertible Cadillac at 65 miles an hour and he continued at 65 miles per hour and passed the stop sign without stopping, striking Mrs. Smith."

That's direct evidence of that disputed issue.

Now, I did not see nor was I in a position to see whether or not he stopped at the stop sign before proceeding, but I do have evidence to offer on the issue. I have circumstantial evidence from which the jury may reasonably draw the inference that the car proceeded down the street and did not stop at the stop sign. I might say, "Well, while I was talking with my courtroom deputy, Mr. Adler, I happened to turn my eye to the right and I caught part of the roadway and I saw Mr. Jones coming down in this white Cadillac at about 65 miles per hour and then I lost sight of him for about 150 feet. The stop sign was not in my view for I was facing Mr. Adler and I turned to my left and I saw the same car two seconds later proceed and strike Mrs. Smith."

I think you will agree with me from those facts you could reasonably infer that Mr. Jones did not stop

at the stop sign. Why? Well, he traversed about 150 feet in about two or three seconds, so it is reasonable to infer that he passed the stop sign without stopping.

The law doesn't hold that one type of proof is a better quality than another. At times circumstantial evidence is better. At times direct evidence is better. It requires the Government to prove all the essential elements of the crime charged by both the direct and circumstantial evidence by proof beyond a reasonable doubt.

What is the evidence? It is the testimony of the witnesses regardless of who called the witness, whether the defendant or the Government. The exhibits marked in evidence regardless of who marked the exhibits into evidence. The facts stipulated to. The only fact that was conceded was that the defendant was present within the district.

I think it is helpful to know what is not evidence. The statements of counsel and the opening and summation is not evidence. Both are helpful devices. The opening alerts the jury to the position of both parties, the Government and the defendant, so that you can more easily follow the testimony. The summation argues the evidence, offers theories on

behalf of the defendant, the theory of exculpability. On behalf of the Government, inculpability which means a theory of guilt. On behalf of the defendant, a theory of innocence. You can consider the arguments.

If the testimony does not agree with your recollection, of course, it is your recollection that counts. If any theory is not attractive to you, just reject it. If one sounds like sense to you, of course. It is a guide to you and you should consider it. You decide the case on the evidence.

Matters that are stricken from the record are not evidence. It is physically stricken from the record and should be figuratively stricken from your minds. Do not consider it, the theory being if it is not in the record, it is not part of the case.

Now, at times objections to questions were sustained by the Court. Again, those were rulings of law and you should not speculate on what the answer might have been if the witness were permitted to answer. I have used the term "inference" and I have used the term "presumption." A presumption is a conclusion which the law requires the jury to make and prevails unless overcome by proof to the contrary beyond a reasonable doubt.

An example of that, of course, is the presumption of innocence.

An inference, on the other hand, is a discretionary matter. It is a conclusion which the jury may make and the example of that, of course, is the conclusion which the jury may come to in determining an issue through circumstantial evidence.

You, the jury, are the sole judges of the credibility of the witnesses. You have the obligation of scrutinizing the testimony to determine the believability of the witnesses. Recall the circumstances under which each witness has testified and every matter in evidence which tends to show whether the witness is worthy of belief. Consider the witness' intelligence. In the case of the defendant, consider the difficulty he has with the English language. Consider the motive and state of mind of the defendant, why is he testifying, what motivates him?

Consider the demeanor and manner of the witness while the witness is on the witness stand. Did the witness answer directly? Did he try to evade? Did he try to avoid answering?

Again, when we refer to the defendant take into consideration the difficulty that he has with the

English language. Consider the witness' own ability to observe the matters to which the witness has testified, whether the witness shall have impressed you of having an accurate recollection to the matters to which he is testifying. Take into consideration the relationship that the witness has to the outcome of the case and the way the witness might be affected by the verdict. The extent to which, if at all, the witness' testimony is corroborated or contradicted by other evidence in the case.

A defendant is not compelled to testify. Once he takes the stand he is treated like every other witness and you assess the credibility of the defendant's testimony according to those guidelines and according to your good common sense and experience. Do not leave that outside the courtroom door or outside the jury room when you talk about assessing the credibility of a witness.

Now, the Government called Mr. George Wynn as a fingerprint expert. He expressed an opinion on the identity of the fingerprint made in Government's Exhibit 6, which is a document issued by the Mexican Government indicating military service, with the fingerprint on Government's Exhibit 7 which is a

fingerprint record made by Deputy Marshal Horace Jacobs. He didn't recall anything about the fingerprints, but he recalled making out the card. The fingerprint expert testified as to the identity of both fingerprints and he said they were made, in his opinion, by the same person. The rules of evidence ordinarily do not permit a witness to testify as to opinions or conclusions. Witnesses testify as to what they saw or heard.

However, the exception to that rule is the opinion of an expert witness. An expert witness is one who by reason of education or experience becomes expert in some particular art. In Mr. Wynn's position he based his expertise on some fifteen years of experience examining I do not know how many fingerprints. If you recall I found him qualified to express an opinion. I did not intend to convey to you any idea I had as to what weight should be given his opinion or whether it should be given any weight at all. Again, I made a ruling as a matter of law. I leave to you the weight to be given the opinion of the expert. You consider the opinion of Mr. Wynn and you determine what weight it deserves and you consider the experience of Mr. Wynn as a fingerprint expert and the

reasons he gave in support of his opinion. If you find that his experience was insufficient or the reasons for his opinion were not valid or that the opinion is outweighed by other evidence in the case, you may if you wish disregard the opinion entirely. So you look at the whole case and decide what weight you should give to each witness.

Of course, if you find that any witness knowingly and intentionally testified falsely as to a material matter, you may disregard all that witness' testimony. You may feel that he is unworthy of belief.

On the other hand, you may choose to believe testimony that you recognize as truthful and consider that in arriving at your determination. Again, the principle underscores the wide discretion that the jury has in assessing the credibility of witnesses.

Now, Mr. Valdez -- I call him Mr. Valdez only because the caption reads Gabriel Galindo-Valdez. The defendant claims his name is Louis --

A JUROR: Spittle.

THE COURT: -- Spittle. So you recall it. My recollection isn't too good.

I meant to say parenthetically that during the trial I asked some questions. Now don't place any

special significance on the questions and on the answers to the questions that I asked. Don't attach any greater emphasis on the questions or the answers because I asked them. If I asked a question it is because I was confused as to a certain area of the testimony and felt it would be helpful for you if I asked some questions to clear it up and that was the only purpose. I asked it almost as a lawyer would ask in examining a witness and not as a judge. Again, the sole purpose was to clear up what I thought at the moment might have been a confusion. It might not have been an issue that confused you, but at times I guess at those things and think it might be helpful.

Now coming to this statement which is Government's Exhibit 3. Mr. Spittle took the stand. The Government faced him with a statement he made on March 13, 1973 in which he said, "I have never used any other names. I was born in Mexico City, Mexico, on February 24, 1953 and I am still a citizen of Mexico. My father's name is Gabriel Galindo. My mother's name is Serafina Valdez. Neither has been a citizen or resident of the United States."

He signed it "Gabriel Galindo-Valdez,"

Now, on redirect examination he explained that

he was in jail at the time under a form of duress and coercion and he felt this was a way out and he signed it.

Well, this was introduced by the Government as a prior inconsistent statement, inconsistent with the testimony that he gave before you. It is what we call impeaching evidence. It attacks the credibility of the evidence given before you. The determination as to whether it is an inconsistent statement is solely for you. The effect it has on the credibility of the witness is a question solely for you. You determine whether it is as to a material or immaterial fact. Also, consider all the circumstances under which the statement was made, including the difficulty he has with the English language and his testimony as to why he made the statement, and all the circumstances at the time it was made.

When you shall have done that, you determine whether the statement is inconsistent, whether it is inconsistent as a material matter and whether and how and to what extent it affects his credibility, his believability.

Turning now to the charge in the indictment. The indictment charges as follows:

"On or about the 13th day of September, 1973 within the Eastern District of New York, the defendant Gabriel Galindo-Valdez, having previously been arrested and deported from the United States pursuant to law, on April 2, 1973 was found in the United States, the defendant well knowing that his presence in the United States was unlawful in violation of 8 United States Code Section 1326."

The defendant, of course, has pleaded not guilty to the indictment and I charged you before that the mere reading of this indictment is no proof of the charge itself. The proof to support the charge in this indictment must come from the testimony from the witnesses and the exhibits and the reasonable and fair inferences that may be drawn from the record. I think I told you before when you were picked that most of the federal law is codified and this is codified under Title 8. That is why it says Title 8. Title 8 is Aliens and Nationalities.

The Congress determines what is a crime and what is not a crime. The Congress has said this under Section 1326 and I am reading the pertinent part of it:

"Any alien who has been deported and thereafter

is at any time found in the United States commits a crime."

So that the section says that if an alien having been deported is found in the United States, he is guilty of the crime charged.

(continued next page)

The essential elements of the crime that I will recite to you do nothing more than break up the portions -- the parts of the crime to give you the opportunity to focus on what is in issue. That is why we do it. There are three essential elements of the crime charged.

First, that at the time alleged in the indictment the defendant was an alien and the time alleged in the indictment is the thirteenth day of September, 1973.

Second, that the defendant was arrested and deported from the United States to Mexico in pursuance of law on or about April 2, 1973.

Third, that thereafter, and on or about September 13, 1973 the defendant was found unlawfully present in the United States, in the Eastern District of New York as charged.

Now, the Government must prove all those essential elements of the crime charged beyond a reasonable doubt. Again, I say to you that the lawyers have agreed that the critical issue is whether the defendant is an alien. If he is a citizen, of course, he did not violate the law and the Government must prove beyond a reasonable doubt that he is an alien.

You will shortly be excused from the courtroom

to deliberate on the matter. The verdict that you render must be unanimous. Each juror must decide the case for himself and herself. Each juror has the obligation of discussing with all the other jurors the evidence in the case with a view to arriving at a unanimous verdict. In other words, it means this: It would be a violation of a juror's oath to go into the jury room and say, "I have decided this case. Do not talk to me about it. When the other eleven have agreed with me, we will have a verdict."

That is wrong. It is equally wrong for a juror to abandon his duty and obligation. It would be wrong for a juror to say, "Well, you tell me what you want me to do, you know, I am a nice fellow. I go along with the majority."

That's wrong. Each juror must decide the case for himself and herself and each jury must talk about the case so if you have arrived at a tentative verdict and upon re-examination of the evidence you find that your original verdict was wrong, you have an obligation to give it up and arrive at the verdict that the evidence tells you supports the change.

During your deliberations you might have occasion to communicate with the Court. You will do

that through your Foreman. If you want to hear any of the testimony, just send a note through your Foreman, "I would like to hear the testimony" and identify the witness. If it is according to subject matter, tell me what the subject matter is.

Do not tell me how you stand at any particular time if it is not unanimous. Do not tell me you stand six to six, eight to four, ten to two or eleven to one. I am only interested when you have arrived at a verdict. All you have to do is say, "We have a verdict." Do not tell me what the verdict is. Just say, "We have arrived at a verdict." I will call you into the courtroom and ask the Foreman to stand and I will say, "I have your note that you have arrived at a verdict in the case of United States of America against Gabriel Galindo-Valdez. How do you find the defendant, guilty or not guilty?"

Then you will render the verdict and then I will ask Juror No. 2 whether that is her verdict, Juror No 3 whether that is her verdict and so on to Juror No. 12. Then for the first time in open court the verdict of the jury becomes the verdict in this case.

Now, you may want the exhibits. All you need

do is ask for the exhibits. You can ask for all the exhibits or ask for a particular exhibit. At this point I would ask you to leave the courtroom. Do not discuss the case yet. I will call you back in in about two or three minutes and then excuse you again. You will then start your deliberations. The jury is excused.

(Jury leaves courtroom.)

THE COURT: Mr. Woodfield, any exceptions?

MR. WOODFIELD: No, your Honor.

MR. CHREIN: Yes, your Honor.

When the Court discussed the criteria to be used by the jury in weighing the credibility of the testimony of witnesses, the Court might have inadvertently said, "Consider the motive or state of mind of the defendant."

The criteria should apply to all witnesses.

Another point I would like to raise. While the indictment is captioned -- while the case is captioned United States of America against Gabriel Galindo-Valdez, I would ask the Court to instruct the jury that the fact that Gabriel Galindo-Valdez appears in the caption is in no way proof --

MR. WOODFIELD: I think that your Honor has adequately covered that.

THE COURT: I said it once. I said the mere fact that I am calling him Valdez is because it is in the caption. That's the very point in issue.

MR. WOODFIELD: And also the weight of the indictment.

THE COURT: I will charge it.

MR. CHREIN: One point I am not sure whether the Court made it clear whether they have the right to discard the statements if they feel it is coerced. I know the Court touched on it. I am not sure whether that was made clear to the jury. That is the statement signed by the defendant in March.

MR. WOODFIELD: I think your Honor went into it and the witness stated he was coerced and they could weigh that in their minds. I think that was adequately covered by your Honor.

THE COURT: I will say something about it.

MR. CHREIN: Thank you, your Honor. I have no further exceptions or requests.

THE COURT: All right, seat the jury.

(Jury present)

THE COURT: It was called to my attention when I was giving you the guidelines and criteria for assessing the credibility of witnesses, I referred to the

motive and state of mind of the defendant as a witness. Of course, that applies to all witnesses. Why is each witness testifying in the state of mind of each witness? I didn't mean to limit it to the defendant. Everything that applies to a witness applies to the defendant. Everything that applies to the defendant as a witness applies to all the other witnesses.

I recited the caption of the case United States of America against Gabriel Galindo-Valdez and I also said that the indictment is no proof of the charge in the indictment. One of the issues in this case is whether his name is Gabriel Galindo-Valdez or whether it is Louis Spittle. The mere fact that I recited it is of course no proof that his name is Gabriel Galindo-Valdez. That has to come from the testimony of the witnesses and the exhibits.

Now, I talked about this statement made on March 13, 1973. The Government must prove beyond a reasonable doubt that this statement was knowingly and intentionally and voluntarily made. Of course, if it was coerced, if he wasn't aware of what he was doing, if he wasn't aware of what he was saying, you must disregard it. It's only his statement if he knew what he was saying, what he was doing.

With that, Alternate No. 1, you were promoted from 2 to 1. Now you are excused because only twelve may deliberate on the matter. If you have any clothing in the jury room, please take it now. When your lunch arrives at about 12:00 o'clock or a quarter of twelve, come into my chambers and get your lunch. You will have to eat it separate from the jury.

(Alternate juror excused)

Will the Clerk please swear in the marshal?

(Marshal sworn)

The jury is excused from the courtroom in the custody of the marshal to perform the obligation which they were sworn to and that is to render a true and just verdict. Be fair to both sides. Be fair to the Government and be fair to the defendant. Base your verdict solely on the evidence free of all bias or prejudice or sympathy. I am sure you will perform your duty in accordance with your oath and the highest traditions of this court.

The jury is excused for deliberation on this matter. Your lunch will be delivered at a quarter to twelve or twelve. At about that time I will excuse the lawyers. I will ask the lawyers to come back by 12:30. You may not hear from me if you deliver a note for I

must take it up with the lawyers. I cannot act on it outside the presence of the lawyers. During that brief period when I excuse them you may not get a response from me. It is not that I am not paying attention to you. It is because I am not at liberty to discuss it with you until I have discussed it with the lawyers.

The jury is excused to deliberate on the matter before you.

(Jury leaves courtroom.)

MR. CHREIN: Your Honor, to avoid coming back, I would have no objection to submitting the exhibits to the jury if they ask for them.

THE COURT: I do not have to call in the lawyers?

MR. WOODFIELD: I have no objection to that.

THE COURT: Suppose you give all the exhibits to the Clerk.

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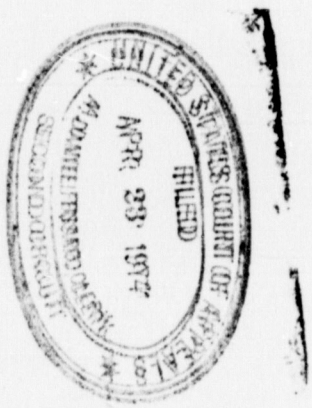
THE COURT: The first note from the jury asks for all the exhibits and then the transcript of the defendant's testimony. Of course, I can give them the transcript but I will read the testimony.



Certificate of Service

April 23, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

Sheila Gentzler